TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 27

WM. H. MOORE, JR., TRUSTEE IN BANKRUPTCY FOR THE ESTATE OF SASSARD & KIMBALL, INC., BANKRUPT, PETITIONER,

vs.

O. S. BAY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 7, 1931

CERTIORARI GRANTED APRIL 20, 1931

(35,695).

(35,695)

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

For Appellant:

CRAIG & WELLER, Board of Trade Building, Los Angeles, California.

For Appellee:

SYLVAN G. BAY, 712 Rowan Building, Los Angeles, California.

In the United States District Court of the Southern District of California, Central Division.

IN BANKRUPTCY—No. 14,101-M.

In the Matter of SASSARD & KIMBAL, INC., Bankrupt.

PETITION FOR REVIEW OF FINAL ORDER OF REFEREE.

To the Honorable RUPERT B. TURNBULL, Esq., Referee in Bankruptcy:

Your petitioner respectfully shows:

I.

That on or about the 15th day of January, 1930, an order to show cause was issued out of the above-entitled court, directing Sylvan G. Bay to show cause why an order should not be made decreeing a chattel mortgage executed by Sassard & Kimbal, Inc., Bankrupt herein, in favor of Sylvan G. Bay to be void and of no force and effect as to the

creditors of the said Sassard & Kimbal, Inc., Bankrupt, and the Trustee in Bankruptcy hereafter to be elected.

II.

That on the 23d day of January, 1930, a hearing was had on said order to show cause and it was stipulated by and between counsel that said order to show cause be deemed effective as against O. S. Bay, assignee of the chattel mortgage and that said O. S. Bay legal holder of the note and chattel mortgage submitted himself to the jurisdiction of the above-entitled court.

III.

Upon the hearing of the order to show cause why an order prayed for in the petition of the receiver Wm. H. Moore, Jr., should not be granted, a final order was made by the said Referee as follows, to wit, a copy of which is herewith attached to this petition for review and made a part hereof. [1*]

That said order was, and is, erroneous in the following respects, to wit:

1. That the conclusions of law, to wit:

"That the chattel mortgage executed as aforesaid in favor of Sylvan G. Bay, and subsequently assigned to Dr. O. S. Bay is invalid and void as to Wm. H. Moore, Jr., Trustee, and the creditors represented by him, and for the reason that there was no notice of intention *to* chattel mortgage recorded as required by Sec-

*Page-number appearing at the foot of page of original certified Transcript of Record.

tion 3440 of the Civil Code, State of California";

are not supported by the findings of fact nor the evidence, and that the conclusion of law is erroneous and against the law.

2. That the conclusions of law, to wit:

"That said chattel mortgage is invalid and void as to Wm. H. Moore, Jr., Trustee, and the creditors represented by him for the reason that there was no immediate recordation of said mortgage, same having been kept off record for a period of fourteen days, without any circumstances justifying said delay."

is erroneous and against the law and the evidence.

WHEREFORE, petitioner prays that said order be reviewed and modified in the following particulars, to wit:

1. That it be decreed that said chattel mortgage, executed by Sassard & Kimbal, Inc., bankrupt herein be adjudged a valid and existing lien against all property covered thereby as against Wm. H. Moore, Jr., Trustee, and the creditors represented by him, and against all the world.

2. That it be decreed that said chattel mortgage be adjudged a valid and existing lien against all property covered thereby, as against all creditors of Sassard & Kimball, Inc., bankrupt herein, that became such creditors subsequent to December 19, 1928, and against Wm. H. Moore, Jr., Trustee, as to those creditors represented by him which said

creditors became such subsequent to December 19, 1928.

3. That said order be reviewed and modified [2] as provided in the bankruptcy law of 1898 and Amendment thereto and General Order Number 27.

O. S. BAY,
Petitioner.

SYLVAN G. BAY,
Attorney for Petitioner.

State of California,
County of Los Angeles,—ss.

Sylvan G. Bay, being by me first duly sworn, deposes and says: that he is the attorney for the petitioner herein in the above-entitled matter, that he is entirely familiar with all the facts and circumstances surrounding this matter and has read the foregoing petition and known the contents thereof; and that the same is true of his own knowledge except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

SYLVAN G. BAY.

Subscribed and sworn to before me this 3d day of February, 1930.

[Seal] CHARLES REICHE,
Notary Public in and for the County of Los Angeles, State of California. [3]

[Title of Court and Cause.]

ORDER DECLARING CHATTEL MORTGAGE OF DR. O. S. BAY INVALID AND VOID AS TO THE TRUSTEE.

A petition having been filed by Wm. H. Moore, Jr., Receiver, for an order to show cause directing Sylvan G. Bay to appear before the undersigned Referee in Bankruptcy and show cause why an order should not be made declaring a certain chattel mortgage executed in favor of Sylvan G. Bay on December 5th, 1928, and recorded December 19th, 1928, in Book 7383, page 159 of Official Records of the County of Los Angeles, State of California, void and invalid as to Wm. H. Moore, Jr., Trustee, and as to creditors of Sassard & Kimball, Inc., and said order to show cause having been issued and a hearing on same having taken place on the 23d day of January, 1930, and prior to said hearing Dr. O. S. Bay, assignee of the aforesaid chattel mortgage, appearing in person and through his attorney, Sylvan G. Bay, and consenting to the jurisdiction of the court and to be bound by any decision with respect to the validity of said chattel mortgage.

Now, after due consideration of the evidence and authorities presented, all of the facts set forth in the petition of Wm. H. Moore, Jr., with the exception of Paragraph VIII, having been stipulated to be correct, and it having been stipulated that said chattel mortgage was executed on December

5th, [4] 1928, notwithstanding an answer filed by Sylvan G. Bay disputing certain of the facts as set forth,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the chattel mortgage executed as aforesaid, in favor of Sylvan G. Bay and subsequently assigned to Dr. O. S. Bay, is invalid and void as to Wm. H. Moore, Jr., Trustee, and the creditors represented by him, and for the reason that there was no notice of intention to chattel mortgage recorded as required by Section 3440 of the Civil Code, State of California; and for the further reason that there was no immediate recordation of said mortgage, same having been kept off record for a period of fourteen days without any circumstances justifying said delay.

Dated: At Los Angeles, California, this 27th day of January, 1930.

RUPERT B. TURNBULL,
Referee in Bankruptcy. [5]

[Endorsed]: Filed Feb. 6, 1930, at 15 min. past 9 o'clock A. M.

Received copy of the within this 3 day of February, 1930.

CRAIG & WELLER,
Attorney for Trustee [6]

[Title of Court and Cause.]

REFEREE'S CERTIFICATE ON REVIEW.

I, Rupert B. Turnbull, one of the Referees in Bankruptcy at Los Angeles, California, hereby certify that in the above-entitled matter, the bankrupt was duly adjudicated on the 31st day of December, 1929; that the first meeting of creditors was duly had on the 27th day of January, 1930, and after due notice to creditors thereof, and at said first meeting of creditors, Wm. H. Moore, Jr., was duly elected Trustee of the estate of the bankrupt, filed his bond in the sum of Ten Thousand ($10,000.00) Dollars, the amount suggested by the creditors and the amount required by the Court, which bond was duly approved.

That prior to the election of a Trustee, an order was duly made appointing Wm. H. Moore, Jr., as Receiver, which order was made by this Referee and the said Receiver qualified thereupon on the 31st day of December, 1929.

That prior to the election of a Trustee, the Receiver filed his petition for an order to show cause, upon which petition the Referee made an order requiring Sylvan G. Bay to show cause on January 21, 1930, at 2:00 o'clock P. M., why your Referee should not make an order declaring chattel mortgage executed by the bankrupt, Sassard & Kimball, Inc., as mortgagor, in favor of Sylvan G. Bay, mortgagee, to be void and of no force and effect.

That on the 23d day of January, 1930, the hearing was had on said order to show cause, and the Trustee appeared by his counsel, Messrs. Craig & Weller, James P. Keleher of counsel; Sylvan G. Bay appeared for himself, he being an attorney at law, and it [7] was stipulated that said proceeding might go forward to all effects and purposes as if O. S. Bay had been named as one of the respondents, that O. S. Bay appeared, submitted to the jurisdiction of the Referee with respect to the subject matter of the order to show cause, appeared by his counsel, Sylvan G. Bay, and submitted himself to the jurisdiction of the above-entitled court.

It was stipulated by the counsel for the Trustee and by Sylvan G. Bay and O. S. Bay that, notwithstanding the denials contained in the answer of Sylvan G. Bay, the following facts were true:

1st. That on the 23d day of November, 1928, and all times thereafter, up to the date of bankruptcy, December 31, 1929, the bankrupt was a merchant engaged in selling automobiles, automobile parts and accessories, with its place of business at 6054 Pacific Boulevard, Huntington Park, California.

2d. That the Receiver was appointed on December 31, 1929, and immediately thereafter came into possession of all the furniture, show room equipment and shop equipment of the bankrupt, situated at 6054 Pacific Boulevard, Huntington Park, California, together with one Ford Roadster, license 190395, one Studebaker Big Six service car, California 1928 license 83241, and that at all times

the Receiver had been in possession from and after the date of the appointment of said Receiver.

3d. That on November 23, 1938, more than a year prior to the bankruptcy of the bankrupt, the bankrupt had made, executed and acknowledged a chattel mortgage in favor of Sylvan G. Bay as mortgagee, said mortgage being dated November 23, 1928, acknowledged November 30, 1928, affidavit of good faith executed on December 5, 1928, but which was not recorded until December 19, 1928.

4th. It was stipulated that December 5, 1928, at the time the last act was done with respect to the execution of said mortgage, to wit, the affixing of the affidavit of good faith [8] thereon, was the date to be considered as the date of the making of said mortgage.

5th. It was further stipulated that at the date of the making and execution of said mortgage, on December 5, 1928, there were existing creditors of said Sassard & Kimball, Inc., who were then unpaid and are now unpaid. That said creditors who were creditors prior to the time of the execution of said mortgage, have remained continuously since said times, and at all times since and up to the date of the filing of the petition in bankruptcy herein, and are now unpaid creditors of the bankrupt. That other and additional creditors have come into being, to wit, creditors of the bankrupt since the making of the said mortgage on December 5, 1928, and between said date and the date of recording, December 19, 1928, that said

creditors are unpaid. It was further stipulated that after the recording of said mortgage on December 19, 1928, other and additional creditors came into being, continued to exist and now exist as unpaid creditors of the bankrupt. It was expressly stipulated that the three (3) sets of creditors as to point of time still exist, that is to say, creditors who had become creditors prior to December 5, 1928, creditors who became creditors between the date of the making of the mortgage and the date of the recording thereof, and third, the creditors who had come into existence since the date of the recording of the mortgage.

6th. It was further stipulated that prior to the making and execution of said mortgage, that is to say, prior to December 5, 1928 and thereafter no notice of intention to mortgage a stock in trade of a merchant, or fixtures and equipment of a merchant, to wit, the stock in trade or fixtures of the bankrupt was made, was executed or was recorded in the office of the County Recorder of Los Angeles County, California, either pursuant to Section 3440 of the Civil Code of the State of California, or at all. [9]

The Referee finds that Huntington Park, California, and the place of business of the bankrupt at 6054 Pacific Boulevard were at all times within the County of Los Angeles, State of California, and the stock in trade of the bankrupt and the fixtures and equipment of the bankrupt at all the times herein mentioned were in the county of Los Angeles, State of California.

No reason or excuse of any kind was given or urged by the respondents as to explain the failure to record said chattel mortgage between the date of its execution, December 5, 1928, and the date of its recording, December 19, 1928. No reason was assigned for failure to comply with Section 3440, Civil Code of the State of California.

The matter was submitted to your Referee for decision by the respective parties.

It was argued by counsel for Sylvan G. Bay and O. S. Bay that said mortgage was valid as against all creditors of the bankrupt subsequent to the date of the recordation of said mortgage, and it was argued that your Referee should find that a division should be made of the creditors as represented by the Trustee into classes, that as against all creditors prior to the date of recording that the mortgage should be held void, and as all creditors after the date of recording, should be held valid. It was argued a dividend should be declared to one class of creditors and denied to the other.

The Referee concluded that the mortgage was invalid for three (3) reason:

First—that it had been kept off of record for a substantial period of time and that said period of time did not constitute an immediate recording as required by law.

Second—that said mortgage was void by reason that there had been no compliance with Section 3440, Civil Code of the State of California. [10]

Third—that said mortgage was void as to the Trustee for the reason that it was stipulated that there were valid existing, unpaid creditors of the bankrupt prior to the execution of the mortgage, and also that there were creditors created between the time the mortgage was executed and the time that the same was recorded.

Whereupon, the Referee made an order declaring the chattel mortgage invalid and void as to the Trustee and creditors generally as represented by the Trustee, which order is in words and figures as follows:

"In the District Court of the United States for the Southern District of California, Central Division.

IN BANKRUPTCY—No. 14101-M.

In the Matter of SASSARD & KIMBAL, INC., Bankrupt.

ORDER DECLARING CHATTEL MORTGAGE OF DR. O. S. BAY INVALID AND VOID AS TO THE TRUSTEE.

"A petition having been filed by Wm. H. Moore, Jr., Receiver, for an order to show cause directing Sylvan G. Bay to appear before the undersigned Referee in Bankruptcy and show cause why an order should not be made declaring a certain Chattel Mortgage executed in favor of Sylvan G. Bay on December 5th, 1928, and recorded December

19th, 1928, in Book 7383, Page 159 of Official Records of the County of Los Angeles, State of California, void and invalid as to Wm. H. Moore, Jr., Trustee and as to creditors of Sassard & Kimbal, Inc., and said order to show cause having been issued and a hearing on same having taken place on the 23rd day of January, 1930, and prior to said hearing Dr. O. S. Bay, Assignee of the aforesaid chattel mortgage, appearing in person and through his Attorney, Sylvan G. Bay, and consenting to the jurisdiction of the Court and to be bound by any decision with respect to the validity of said chattel mortgage,

"Now, after due consideration of the evidence and authorities presented, all of the facts set forth in the petition of Wm. H. Moore, Jr., with the exception of Paragraph VIII, having been stipulated to be correct, and it having been stipulated that said chattel mortgage was executed on December 5th, 1928, notwithstanding an answer filed by Sylvan G. Bay disputing certain of the facts as set forth,

"IT IS HEREBY ORDERED, ADJUDGED AND DECREED That the Chattel Mortgage executed as aforesaid, in favor of Sylvan G. Bay and subsequently assigned to Dr. O. S. Bay, is invalid and void as to Wm. H. Moore, Jr., Trustee, and the creditors represented by him, and for the reason that there was no notice of intention to chattel mortgage recorded as required by Section 3440 of the Civil Code, State of California; and for the further reason that there was no immediate recor-

dation of said mortgage, same having been kept off record for fourteen days without any [11] circumstances justifying said delay.

"Dated: At Los Angeles, California, this 27th day of January, 1930.

"(Signed) RUPERT B. TURNBULL,
"Referee in Bankruptcy."

Thereupon, the mortgagees, Sylvan G. Bay and O. S. Bay, feeling themselves aggrieved, filed a petition for review of said order.

The Referee transmits with this certificate the said original petition for review of final order of Referee. There were no exhibits introduced, the evidence all coming in by stipulation of the parties as above recited.

No transcript of the evidence has been prepared because none has been requested by any of the parties and no fees have been deposited for preparing such transcript. If transcript is desired, same may be obtained from H. A. Singeltary, whose address is 672 Subway Terminal Building, Los Angeles, California.

Dated, at Los Angeles, California, this 4th day of February, 1930.

RUPERT B. TURNBULL,
Referee in Bankruptcy. [12]

[Endorsed]: Filed Feb. 6, 1930, at 15 min. past 9 o'clock A. M. [12-a]

[Title of Court and Cause.]

MEMORANDUM ON PETITION TO REVIEW.

On December 5, 1928, the bankrupt executed a chattel mortgage to petitioner covering certain personal property, stock in trade, office furniture and equipment used in its business. This chattel mortgage was filed for record fourteen days after its execution. There was a failure to comply with the provisions of Section 3440, Civil Code of California, providing that a chattel mortgage "will be conclusively presumed to be fraudulent and void as against the existing creditors of the * * * mortgagor, unless at least seven days before the consummation of such * * * mortgage the mortgagor * * * shall record in the office of the county recorder * * * a notice of said intended * * * mortgage," setting out the particulars of its proposed effect and its purpose.

By stipulation, it is agreed that at the time of the filing of the voluntary petition in bankruptcy, there were creditors of three classes:

1. Those existing at the time of the execution of the mortgage.
2. Those arriving at the status of creditors during the interval between the execution and the recordation.
3. The holders of claims coming into existence subsequent to the recordation.

As a chattel mortgage is considered to be in effect, a transfer of title, recording is necessary in order

to meet [13] the law of California that a transfer of title not accompanied by immediate delivery is deemed fraudulent, and it seems to be the law, therefore, that the recordation of a chattel mortgage, to be effective against creditors, must immediately follow the execution, wherefore it is conceded here as will hereafter appear, that the creditors reaching that status in the interval of fourteen days between the execution and recordation in the instant case are not affected by the mortgage, the delay being regarded as unreasonable.

The Referee held that the mortgage was void against creditors of each of the classes. It is conceded that this is true as to those in the first two categories, but the petitioner contends that as to those creditors coming into being subsequent to the date of recordation, December 19, 1928, the mortgage is good, and this is the issue before the Court.

The first inquiry is then as to how, in this respect, the mortgage is regarded by the law of California. We have already quoted from a pertinent statute. (Sec. 3440, Civil Code.) Another section (Sec. 2957, Civil Code) provides that a mortgage shall be void "against * * * subsequent purchasers and encumbrancers * * * unless:

(1) It is accompanied by a certain appropriate affidavit.

(2) It is properly acknowledged.

This mortgage satisfied both of these conditions.

It seems to be settled in California that the instant encumbrance is good against all creditors whose claims did not come into existence until after

its recordation. Section 3440, we think, upon principle, does not affect its right to recordation, and as this act favors only "existing creditors," that is, those in that status at its recordation, it does not support the Referee's conclusion against subsequent creditors. [14] Section 2957 precludes the thought that once recorded, it is void against subsequently created interests, because neither of the two incidents, omission of either of which would avoid it, is absent. The statement of conditions which would avoid excludes any other reason. In effect, it is good against subsequent creditors by the settled law of the state as indicated, among other cases, by the decisions in Ruggles vs. Cannedy, 127 Cal. 290, and United Bank and Trust Company vs. Powers, 265 Pac. 403. Many cases are cited to us in the briefs as supporting a contrary view, to which we have given careful attention, the last being Noyes, Trustee, vs. Bank of Italy, Vol. 77, Cal. Dec. 179, but upon their facts these cases are very clearly distinguishable. In fact, we do not consider them to apply at all.

In 1910, the bankruptcy act was amended to make clear the position of the Trustee. It seems to have been the theory of the Referee that the effect of this amendment, which gave the Trustee the status of an execution creditor, so far affected the status of the creditors of each of the three classes, as against the mortgage, as to place them all on the same level of superiority. In this we are very clear that the Referee was wrong. There is nothing whatever in the cause for, or the language of the amendment

of 1910 to produce such a result. The Trustee indeed represents all creditors, but only as their respective interests in the property under administration were fixed by local law when the bankruptcy proceedings intervened, and it is his duty to administer and distribute accordingly as he finds at that time liens or inferiorities of respective creditors were established. If at that time any creditors had no inchoate right under existing state laws to reduce his claim to judgment and thereby establish a lien by execution superior to an existing and recorded mortgage, he [15] is bound in distribution to recognize the latter's superior position. It is said, as a settled law in federal courts, that there is so much of local nature entering into chattel mortgages that federal courts accept as decisive the state law fixing the priority of such encumbrance. Etheridge vs. Sperry, 139 U. S. 266. See, also, In re Baxter and Co., 154 Fed. 22; and Union Bank of Chicago vs. Kansas City Bank, 136 U. S. 223.

The petition to review therefore should be, and is allowed, and an order appropriate to these conclusions is directed to be entered giving the mortgage priority over the creditors of the 3d class.

With exceptions to the Trustee.

JOHN M. KILLITS,
United States District Judge.

Dated at Los Angeles, California, April 24, 1930.

[Endorsed]: Filed Apr. 24, 1930, at 10 min. past 2 o'clock P. M. [16]

At a stated term, to wit, the February Term, A. D. 1930, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the courtroom thereof, in the City of Los Angeles, on Thursday, the 24th day of April, in the year of our Lord one thousand nine hundred and thirty. Present: The Honorable JOHN M. KILLITS, District Judge *pro tem.*

[Title of Cause.]

MINUTES OF COURT—APRIL 24, 1930—ORDER ALLOWING PETITION TO REVIEW, ETC.

The Court this date having filed memorandum on petition to review Referee's order; in accordance with said memorandum, the petition to review is allowed and an order is directed to be entered giving the mortgage priority over the creditors of the third class. Exception is allowed to the Trustee. [17]

[Title of Court and Cause.]

PETITION FOR ORDER TO SHOW CAUSE AGAINST SYLVAN G. BAY.

Comes now Wm. H. Moore, Jr., and respectfully represents and shows to the Court:

I.

That your petitioner is the duly appointed, qualified and acting Receiver in Bankruptcy in the above-entitled matter.

II.

That the bankrupt herein was on November 23, 1928, and at all times thereafter up to December 31, 1929, the date of the filing of the voluntary petition in bankruptcy herein, a merchant engaged in selling automobiles and automobile parts and accessories at 6054 Pacific Boulevard, Huntington Park, California.

III.

That your petitioner on December 31, 1929, was appointed Receiver in Bankruptcy herein, and immediately thereafter came into the possession of

1 Studebaker Big Six service car, California 1928, license No. 83241; Engine C. G. 19726; title No. 948647,

1 Ford roadster, 1928, license No. 190395; engine No. 10671293; title No. 874122, and

All furniture, show room equipment and shop equipment situated at 6054 Pacific Boulevard, Huntington Park, California, belonging to the bankrupt herein. [18]

IV.

That at all times since said December 31, 1929, the said property has been and now is in the possession of your petitioner as Receiver, subject to the payment of $900.00 per month for the safekeeping thereof, pending the election of a Trustee at a

first meeting of creditors, which is set for January 27, 1930.

V.

That on November 23, 1928, a chattel mortgage covering all of said above mentioned property was executed by Sassard & Kimbal, Inc., and acknowledged on November 30, 1928, affidavit of good faith executed on December 3, 1928, which was recorded December 19, 1928, and recorded in Book 7383, page 159, Official Records of Los Angeles County, State of California; that said chattel mortgage was executed to secure a note dated November 23, 1928, for $10,000.00, payable to Sylvan G. Bay, thirty days after date.

VI.

That at the time of the execution of said mortgage there were existing creditors of said mortgagor who have remained continuously and at all times since and up to December 31, 1929, creditors of said mortgagor, Sassard & Kimbal, Inc., Bankrupt.

VII.

That prior to the execution of said mortgage, no notice of the intended mortgage of stock in trade, fixtures and equipment belonging to said Sassard & Kimbal, Inc., merchants, was recorded in the office of the county recorder of Los Angeles County, California, in which county and state said property was situated, which notice was required by the provisions of Section 3440 of the Civil Code of the State of California.

VIII.

That said chattel mortgage so as aforesaid executed [19] by Sassard & Kimbal, Inc., is invalid and void as to the creditors of Sassard & Kimbal, Inc., Bankrupt, and the Trustee in Bankruptcy hereinafter to be elected, for the reason that said mortgage was not immediately recorded as required by the provisions of Section 2957, Civil Code of the State of California, and on the further ground that no notice of intention to mortgage was recorded as required by the provisions of Section 3440, Civil Code of the State of California, and also that said property is not sufficiently described in said chattel mortgage.

WHEREFORE, your petitioner prays that an order to show cause be issued directing the said Sylvan G. Bay to appear and show cause before the Referee herein, why an order should not be made and entered herein, determining, adjudging and decreeing said chattel mortgage as invalid and void as to the creditors of Sassard & Kimbal, Inc., and the Trustee in Bankruptcy hereinafter to be elected, and that your petitioner and the Trustee hereinafter to be elected, hold the within described property free and clear of any claim of right, title or interest therein by or on behalf of the said Sylvan G. Bay.

WM. H. MOORE, Jr.,
Receiver.

CRAIG & WELLER,
Attorneys for Receiver. [20]

United States of America,
Southern District of California,
Central Division,
County of Los Angeles,—ss.

Wm. H. Moore, Jr., being duly sworn says: That he is Receiver and petitioner in the foregoing entitled matter; that he has read the foregoing petition for order to show cause against Sylvan G. Bay and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters, that he believes them to be true.

WM. H. MOORE, Jr.

Subscribed and sworn to before me this 15th day of January, A. D. 1930.

[Seal] BESS A. ALDRICH,
Notary Public in and for the County of Los Angeles, State of California.

Filed Jan. 15, 1930, at —— min. past 3 o'clock P. M. Rupert B. Turnbull, Referee. H. C. Archibald, Clerk. D.

[Indorsed]: Filed Jun. 24, 1930, 4 P. M. [21]

[Title of Court and Cause.]

ORDER TO SHOW CAUSE.

Upon reading and filing the verified petition of Wm. H. Moore, Jr., Receiver herein, and good cause appearing therefor,—

IT IS ORDERED, that Sylvan G. Bay be, and appear before the Honorable Rupert B. Turnbull, Referee in Bankruptcy, in the above-entitled matter, at the courtroom of Rupert B. Turnbull, 718 Security Building, Fifth and Spring Streets, Los Angeles, California, at the hour of 2:00 o'clock P. M., on the 21st day of January, 1930, and then and there show cause, if any he has, why an order should not be made decreeing the chattel mortgage executed by Sassard & Kimball, Inc., on or about November 23, 1928, in favor of the said Sylvan G. Bay, and recorded in Book 7383, page 159 of Official Records of Los Angeles County, State of California, to be void and of no force and effect as to the creditors of the said Sassard & Kimball, Inc., Bankrupt, and the Trustee in Bankruptcy hereafter to be elected. Copy of Receiver's petition shall be served with this order.

Dated: This 15th day of January, 1930.

RUPERT B. TURNBULL,
Referee. [22]

[Indorsed]: Filed Jun. 24, 1930, 4 P. M.. [23]

[Title of Court and Cause.]

ANSWER TO PETITION FOR ORDER TO SHOW CAUSE.

Comes now Sylvan G. Bay and answering the petition on file herein admits, denies and alleges as follows:

I.

Answering Paragraph III and IV on file herein the respondent has no information or belief on the subject sufficient to enable him to answer Paragraph III or IV of the petition on file and basing his denial on that ground, denies each and every and all allegations contained in said Paragraphs III and IV. Denies specifically that the sum of Nine Hundred ($900.00) Dollars per month or any other sum at all is necessary to be paid for the safekeeping of the property described in said petition.

II.

Answering Paragraph V denies that said chattel mortgage was executed on the 23d day of November, 1928, but alleges as a matter fact that said note and mortgage was executed on the 30th day of November, 1928, and that said affidavit of good faith was executed by Sassard & Kimbal, Inc., a corporation, on December 3d, 1928, and said affidavit was executed by Sylvan G. Bay, mortgagee herein on the 5th day of December, 1928. That thereafter said chattel mortgage was recorded in Book 7383, page 159 of Official Record, Los An-

geles County Records on December 19th, 1928. [24]

III.

Answering Paragraph VI, respondent has no information or belief upon the subject sufficient to enable him to answer and basing his denial on said ground, denies each and every allegation contained in said Paragraph VI.

IV.

That within a few days subsequent to the recordation of said note and chattel mortgage, Sylvan G. Bay assigned said instrument to Dr. O. S. Bay without recourse. That said Sylvan G. Bay had no interest in said indebtedness and/or in said instruments or the obligations secured thereby, except as a medium of transfer to Dr. O. S. Bay. That Dr. O. S. Bay is now the owner and holder of said note and chattel mortgage heretofore referred to.

V.

Denies that said chattel mortgage, as set forth in the petition, is invalid and/or void as to the creditors of Sassard & Kimbal, Inc., Bankrupt, and/or the trustee in bankruptcy hereinafter to be elected and/or any person, firm and/or corporation for the reason as set forth in said petition or for any other reason at all. Alleges as a matter of fact that said chattel mortgage and note heretofore referred to was at all times herein mentioned and now is valid and subsisting lien on the property against said bankrupt and his property. That said

claim is entitled to preference against any and all creditors of said bankrupt corporation.

VI.

Respondent alleges that William H. Moore, Jr., has no jurisdiction on property covered by said chattel mortgage, and alleges further that the above-entitled court has no jurisdiction over the said property covered by the chattel mortgage hereinbefore mentioned. [25]

WHEREFORE respondent prays that an order be made decreeing that the chattel mortgage and note referred to in the petition and answer be declared to be a valid and existing claim against the property of said bankrupt as recited in said chattel mortgage and *valid existing* as against all creditors of said bankrupt and/or trustee in bankruptcy hereinafter to be elected, that it be adjudged that any and all of said claims are subsequent to the claim as set forth in the said note and chattel mortgage, that it further be decreed that said receiver and/or trustee in bankruptcy and/or said bankrupt have no right, title or interest in and to said property, either for themselves and/or any of said creditors, but that Sylvan G. Bay have the right, title and possession of all said property covered by said chattel mortgage.

SYLVAN G. BAY.

State of California,
County of Los Angeles,—ss.

Sylvan G. Bay, being by me first duly sworn, deposes and says: That he is the respondent in the

above-entitled action; that he has read the foregoing answer to petition for order to show cause and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

SYLVAN G. BAY.

Subscribed and sworn to before me this 20 day of Jan., 1930.

[Seal] CHARLES F. REICNE,
Notary Public in and for the County of Los Angeles, State of California.

Filed Jan. 23, 1930, at —— min. past 10 o'clock A. M. Rupert B. Turnbull, Referee. H. C. Archibald, Clerk. B. [26]

[Indorsed]: Filed Jun. 24, 1930, 4 P. M.

Received copy of the within answer, etc., this 20th day of January, 1930.

CRAIG & WELLER—D.,
Attorneys for Wm. H. Moore, Jr., Receiver.
[27]

[Title of Court and Cause.]

STIPULATION AS TO FACTS ON APPEAL.

WHEREAS, the issue involved in the appeal in the above-entitled action arises only on a pure question of law; and

WHEREAS there is no dispute between the appellant and the appellee as to the facts involved in the controversy between the Trustee in Bankruptcy, as appellant and Dr. O. S. Bay, mortgagee, as appellee, and it being the desire of the parties hereto to simplify the record on appeal, now, therefore,—

IT IS STIPULATED AND AGREED by and between the appellant and appellee herein as follows:

I.

That at all times before the 23d day of November, 1928, and up to and including the 31st day of December, 1929, the date of the filing of the voluntary petition in bankruptcy herein, the bankrupt was a merchant engaged in selling automobiles, automobile parts and accessories at 6054 Pacific Boulevard, Huntington Park, California.

II.

That on the 31st day of December, 1929, a voluntary petition in bankruptcy was filed in the District Court of the United States for the Southern District of California, Central Division, by Sassard & Kimball, Inc., bankrupt herein, and that on the same day, to wit, December 31, 1929, Wm. H. Moore, [28] Jr., was appointed Receiver in Bankruptcy for the Estate of Sassard & Kimball, Inc., and upon his qualification as Receiver, took possession of the following described personal property:

1 Studebaker, Big Six service car, California 1928 license 83241, engine #C. G. 19726, title #948647.

1 Ford Roadster 1928 license 190395, engine #10671293, title number 874122, and

All furniture, showroom equipment and shop equipment situated at 6054 Pacific Boulevard, Huntington Park, California, belonging to the bankrupt, Sassard & Kimball, Inc.

III.

That at all times since December 31, 1929, all of the personal property hereinbefore described was in the possession of Wm. H. Moore, Jr., as Receiver in Bankruptcy for the Estate of Sassard & Kimball, Inc., Bankrupt, or in the possession of Wm. H. Moore, Jr., as Trustee in Bankruptcy for the Estate of Sassard & Kimball, Inc., Bankrupt, the appellant herein.

IV.

That on November 23, 1928, a chattel mortgage covering all of the above mentioned property was executed by Sassard & Kimball, Inc., and acknowledged on November 30, 1928, with an affidavit of good faith executed on December 5, 1928, which said chattel mortgage was recorded in the office of the County Recorder of Los Angeles County, California, where said personal property was situated on December 19, 1928, recordation being in Book 7383, page 159 of official records of Los Angeles County, State of California; that said chattel mortgage was executed to secure a note dated November

23, 1928, for the sum of $10,000, payable to Sylvan G. Bay, due thirty days after date.

V. [29]

That thereafter within a few days subsequent to the recordation of said chattel mortgage, Sylvan G. Bay assigned said chattel mortgage and the promissory note secured by it, to the appellee herein, Dr. O. S. Bay, without recourse; that at the time of the filing of the petition for an order decreeing said chattel mortgage to be void in the bankruptcy court, the said Sylvan G. Bay claimed no right, title or interest therein, and that Dr. O. S. Bay is now the owner and holder of said note and chattel mortgage.

VI.

That at the time of the execution of said chattel mortgage there were existing creditors of the bankrupt who have remained creditors continuously and at all times since up to and including December 31, 1929.

VII.

That between the date of the execution of said chattel mortgage and the date of its recordation in the office of the county recorder of Los Angeles County, California, other persons, firms and corporations became creditors of the bankrupt, Sassard & Kimball, Inc., which said persons, firms and corporations have at all times since been creditors and now are creditors of the said bankrupt.

VIII.

That subsequently to the recordation of said

chattel mortgage other persons, firms and corporations became creditors of the bankrupt and at all times since have been and now are creditors of said bankrupt.

IX.

That prior to the execution of said chattel mortgage, no notice of intention to mortgage the stock in trade, fixtures and equipment belonging to the bankrupt Sassard & Kimball, Inc., was recorded in the office of the county recorder of [30] Los Angeles County, California, in which said county and state said property was situated, in accordance with the provisions of Section 3440 of the Civil Code of the State of California.

X.

That after the filing of the petition for an order to show cause why said chattel mortgage should not be decreed to be void against Sylvan G. Bay, Dr. O. S. Bay, the appellee herein, and the real party in interest, was substituted by agreement of the parties in place of Sylvan G. Bay, against whom the original order to show cause was filed.

Dated at Los Angeles, in the Southern District of California, this 23d day of June, 1930.

CRAIG & WELLER,
THOMAS S. TOBIN,
JAMES P. KELEHER,
Attorneys for Appellant.
SYLVAN G. BAY,
Attorney for Appellee.

[Indorsed]: Filed Jun. 24, 1930, 1:45 P. M.

[31]

[Title of Court and Cause.]

ORDER APPROVING STATEMENT OF FACTS AND SETTLING RECORD.

The Court having examined the statement of facts as stipulated to by counsel for the appellant and appellee, and having considered the same, now on motion of Thomas S. Tobin, one of the attorneys for the appellant herein,—

IT IS HEREBY ORDERED, that said statement of facts, as stipulated, be, and the same hereby is, in all respects approved.

Done at Los Angeles, in the Southern District of California, this 24 day of June, 1930.

WM. P. JAMES,
United States District Judge, Acting for Judge Killits, Who Heard This Matter and Who has Returned to Toledo, O.

[Indorsed]: Filed Jun. 24, 1930, 1:45 P. M. [32]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the United States District Court for the Southern District of California, Central Division:

You are hereby requested to make a transcript of record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to an

appeal allowed in the above-entitled proceeding, and to include in such transcript the following:

1. Petition for order to show cause against G. Bay.
2. Order to show cause against Sylvan G. Bay.
3. Answer to petition for order to show cause.
4. Order decreeing chattel mortgage of Dr. O. S. Bay invalid and void as to the Trustee.
5. Petition for review of final order of Referee.
6. Referee's certificate on review.
7. Memorandum on petition for review. [33]
8. Order and decree of District Judge on review, dated April 24, 1930.
9. Stipulation as to facts on appeal.
10. Order settling record on appeal.
11. Praecipe.
12. Citation.

Dated at Los Angeles, California, May 10, 1930.

CRAIG & WELLER,
JAMES P. KELEHER,
THOMAS S. TOBIN,
Solicitors for Appellant.

[Indorsed]: Filed Jun. 24, 1930. 1:45 P. M.

Service of the within praecipe admitted this 19th day of June, 1930.

SYLVAN G. BAY,
Solicitor for Appellee. [34]

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

I, R. S. Zimmerman, Clerk of the District Court of the United States for the Southern District of California, do hereby certify the foregoing transcript, containing 34 typewritten pages, numbered from 1 to 34, inclusive, to be the transcript on appeal in the above-entitled matter, and contains a full, true and correct copy of petition for review of final order of referee, order declaring chattel mortgage of Dr. O. S. Bay invalid and void as to the Trustee, Referee's certificate on review, memorandum on petition to review, minute order, petition for order to show cause against Sylvan G. Bay, order to show cause, answer to petition for order to show cause, stipulation of facts on appeal, order approving statement of facts and settling record, and praecipe;

I DO FURTHER CERTIFY the fees of the Clerk for copying, comparing and certifying the foregoing record on appeal amount to $10.65, and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the District Court of the United States of America, in and for the Southern District of California, Central Division, this 10th day of July, in the year of our Lord

one thousand nine hundred and thirty, and of our Independence the one hundred and fifty-fifth.

[Seal] R. S. ZIMMERMAN,

Clerk of the District Court of the United States of America, in and for the Southern District of California,

By Edmund L. Smith,
Deputy Clerk. [35]

[Endorsed]: No. 6147. United States Circuit Court of Appeals for the Ninth Circuit. Wm. H. Moore, Jr., Trustee in Bankruptcy for the Estate of Sassard & Kimball, Inc., Bankrupt, Appellant; vs. O. S. Bay, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Southern District of California, Central Division.

Filed July 14, 1930.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals for the Ninth Circuit.

IN BANKRUPTCY—No. ——.

In the Matter of SASSARD & KIMBALL, INC., Bankrupt,

and

WM. H. MOORE, Jr., Trustee in Bankruptcy for the Estate of SASSARD & KIMBALL, INC., Bankrupt,

Appellant,

vs.

O. S. BAY,

Appellee.

PETITION FOR APPEAL.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The undersigned Trustee in Bankruptcy for the Estate of Sassard & Kimball, Inc., Bankrupt, conceiving himself aggrieved by the final order and decree of the District Court of the United States for the Southern District of California, Central Division, entered on April 24, 1930, granting the relief sought in the petition on review of the appellee herein, and decreeing the chattel mortgage held by the appellee to be valid as against creditors of the bankrupt whose claims against the bankrupt accrued subsequently to the date of the recordation of said chattel mortgage in the office of the county recorder of Los Angeles County, State

of California, hereby appeals from said order to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons set forth in the assignment of errors herein filed, and he prays that said appeal be allowed and [36] that citation issue as provided by law, and that a transcript of the record, pleadings and documents upon which said order and decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit under the rules of said court in such cases made and provided.

Dated at Los Angeles, in the Southern District of California, this 30th day of April, 1930.

WM. H. MOORE, Jr.,
Trustee in Bankruptcy for the Estate of Sassard & Kimball, Inc., Bankrupt, Appellant.

CRAIG & WELLER,
JAS. P. KELEHER,
THOMAS S. TOBIN,
Attorneys for Appellant. [37]

Service of the within petition for appeal is hereby admitted this 12th day of May, 1930.

SYLVAN G. BAY,
Attorney for Appellee.

[Endorsed]: Filed May 15, 1930. Paul P. O'Brien, Clerk. [38]

In the United States Circuit Court of Appeals for the Ninth Circuit.

IN BANKRUPTCY—No. ——.

In the Matter of SASSARD & KIMBALL, INC., Bankrupt,

and

WM. H. MOORE, Jr., Trustee in Bankruptcy for the Estate of SASSARD & KIMBALL, INC., Bankrupt,

Appellant,

vs.

O. S. BAY,

Appellee.

ASSIGNMENT OF ERRORS.

Comes now Wm. H. Moore, Jr., Trustee in Bankruptcy for the Estate of Sassard & Kimball, Inc., and files the following assignment of errors on appeal from the order of the District Court of the United States for the Southern District of California, Central Division, dated April 24, 1930:

FIRST ASSIGNMENT OF ERROR.

That the United States District Court for the Southern District of California, Central Division, erred in failing to affirm the order of the Referee in Bankruptcy, Rupert B. Turnbull, Esquire, dated January 27, 1930, decreeing the chattel mortgage executed by the bankrupt in favor of Dr. O. S. Bay,

bearing date of November 23, 1923, invalid and void as to the appellant herein as Trustee in Bankruptcy for the Estate of Sassard & Kimball, Inc., Bankrupt. [39]

SECOND ASSIGNMENT OF ERROR.

That the United States District Court for the Southern District of California erred in modifying the order of the Referee described in the first assignment of error and declaring said chattel mortgage to be valid in so far as it affected creditors whose claims accrued subsequently to the recordation thereof.

THIRD ASSIGNMENT OF ERROR.

That the District Court of the United States for the Southern District of California, Central Division, erred in not decreeing said chattel mortgage described in the first assignment of error herein to be wholly null and void in so far as the Trustee in Bankruptcy for the Estate of Sassard & Kimball, Inc., Bankrupt, is concerned.

FOURTH ASSIGNMENT OF ERROR.

That the United States District Court for the Southern District of California, Central Division, erred in dividing the unsecured creditors of Sassard & Kimball, Inc., Bankrupt, into three different classes and granting priority of payment to creditors of the first and second classes of creditors over the third class.

WHEREFORE, the appellant prays that said order may be reversed and the cause remanded

with directions to enter an order decreeing the chattel mortgage described in the first assignment of error to be wholly null and void in so far as the Trustee in Bankruptcy for the Estate of Sassard & Kimball, Inc., Bankrupt, is concerned.

WM. H. MOORE, Jr.,
Trustee in Bankruptcy for the Estate of Sassard & Kimball, [40] Inc., Bankrupt, Appellant.
CRAIG & WELLER,
JAMES P. KELEHER,
THOMAS S. TOBIN,
Attorneys for Appellant. [41]

Service of the within assignment of errors is hereby admitted this 12 day of May, 1930.

SYLVAN G. BAY,
Attorney for Appellee.

[Endorsed]: Filed May 15, 1930. Paul P. O'Brien, Clerk. [42]

At a stated term, to wit, the October term, A. D. 1929, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Friday, the twenty-third day of May, in the year of our Lord one thousand nine hundred and thirty. Present: Honorable FRANK H. RUDKIN, Circuit Judge, Presiding; Honorable FRANK S. DIETRICH, Circuit Judge: Honorable CURTIS D. WILBUR, Circuit Judge.

[Title of Court and Cause—No. 61,477.]

ORDER ALLOWING APPEAL.

Upon consideration of the petition for appeal and assignment of errors, filed May 15, 1930, by Messrs. Craig & Weller, Thomas S. Tobin and James P. Keleher counsel for appellant Wm. H. Moore, Jr., Trustee, etc., IT IS HEREBY ORDERED that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the order of the United States District Court for the Southern District of California, Central Division, entered on April 24, 1930, be, and the same hereby is allowed, and that a certified transcript of the record, testimony, exhibits, stipulations and all other proceedings be forthwith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California. [43]

CITATION ON APPEAL.

United States of America,—ss.

The President of the United States of America, to O. S. Bay, Appellee Herein, and to Sylvan G. Bay, His Solicitor, GREETING:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof,

pursuant to an order allowing an appeal, of record in the Clerk's office of the United States District Court for the Southern District of California, wherein Wm. H. Moore, Jr., as Trustee in Bankruptcy for the Estate of Sassard & Kimball, Inc., Bankrupt, is appellant and you are appellee, to show cause, if any there be, why the decree or judgment rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable FRANK H. RUDKIN, United States Circuit Judge, for the Ninth Circuit, this 23d day of May, A. D. 1930.

FRANK H. RUDKIN,
United States Circuit Judge.

United States of America,—ss.

On this 19th day of June, in the year of our Lord one thousand nine hundred and thirty, personally appeared before me, Olive Diffenderfer, the subscriber, Georgene Bogle, and makes oath that she delivered a true copy of the within citation to Sylvan G. Bay.

GORGENE BOGLE.

Subscribed and sworn to before me at Los Angeles, this 19 day of June, A. D. 1930.

[Seal] OLIVE DIFFENDERFER,
Notary Public in and for the County of Los Angeles, State of California.

My commission expires Nov. 25, 1933.

[Endorsed]: Filed Jun. 27, 1930. Paul P. O'Brien, Clerk. [44]

No. 6147

United States
Circuit Court of Appeals
For the Ninth Circuit.

WM. H. MOORE, Jr., Trustee in Bankruptcy for the Estate of SASSARD & KIMBALL, INC., Bankrupt,

Appellant,

vs.

O. S. BAY,

Appellee.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

At a stated term, to wit, the October Term, A. D. 1930, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Thursday, the sixteenth day of October, in the year of our Lord one thousand nine hundred and thirty. Present: Honorable FRANK H. RUDKIN, Circuit Judge, Presiding; Honorable CURTIS D. WILBUR, Circuit Judge; Honorable FRANK H. NORCROSS, District Judge.

[Title of Cause.]

ORDER OF SUBMISSION.

ORDERED appeal in above cause argued by Mr. Thomas S. Tobin, counsel for the appellant, and submitted on behalf of appellee on affidavit of counsel for appellee, and submitted to the Court for consideration and decision.

At a stated term, to wit, the October Term, A. D. 1930, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Saturday, the sixth day of December, in the year of our Lord one thousand nine hundred

and thirty. Present: Honorable FRANK H. RUDKIN, Circuit Judge, Presiding; Honorable CURTIS D. WILBUR, Circuit Judge; Honorable FRANK H. NORCROSS, District Judge.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT.

By direction of the court, ORDERED that the typewritten opinion this day rendered by this court in the above cause be forthwith filed by the Clerk and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion filed.

[Title of Court and Cause.]

OPINION U. S. CIRCUIT COURT OF APPEALS.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Before RUDKIN and WILBUR, Circuit Judges, and NORCROSS, District Judge.

NORCROSS, District Judge.—This is an appeal from an order made by the court below reversing a ruling of the Referee in Bankruptcy holding a certain chattel mortgage void as to all creditors.

The facts are stipulated and those material are as follows: At all times important to be considered in this case Sassard & Kimball, Inc., was a corporation engaged in the business of a merchant selling automobiles, automobile parts and accessories. On the 31st day of December, 1929, the corporation filed a voluntary petition in bankruptcy and on the same date appellant was appointed receiver for the estate of the bankrupt and, upon qualifying, took into his possession all property claimed to be a part of the estate, including that covered by a certain chattel mortgage in question. On November 23, 1928, the bankrupt executed a chattel mortgage as security for the payment of a certain promissory note for $10,000, payable thirty days after date to the assignor of appellee. The mortgage was acknowledged of date November 30, 1928, the affidavit of good faith was executed December 5, 1928, and the instrument filed for record and recorded by the County Recorder of Los Angeles county on December 19, 1928. The chattel mortgage covered a certain Studebaker service car, a Ford roadster, the furniture, show room and shop equipment of the bankrupt. Prior to the execution or filing of the mortgage no notice of intention to mortgage the stock in trade, fixtures and equipment belonging to the mortgagor was recorded in accordance with the provisions of section 3440 of the Civil Code of California. In relation to the mortgage, the proceeding presents three classes of creditors of the bankrupt: 1. Those existing at the date of the mortgage. 2. Those who became such between the date of the

mortgage and its recordation. 3. Those so becoming subsequent to the recording of the mortgage.

Section 3440 of the Civil Code of California provides that a chattel mortgage "will be conclusively presumed to be fraudulent and void as against the existing creditors * * * unless at least seven days before the consummation of such * * * mortgage the mortgagor * * * shall record in the office of the county recorder * * *. a notice of said intended * * * mortgage," setting out the particulars of its proposed effect and purpose.

It is clear that the mortgage, by reason of the provisions of the statute, is void as to creditors of the first class, and it is conceded it is also void as to those of the second class. As held by decisions of the Supreme Court of California, the mortgage would be valid as against creditors of the third class. (Ruggles vs. Cannedy, 127 Cal. 290; United Bank & Trust Co. vs. Powers, 89 Cal. App. 690.)

It is the contention of appellant that under section 70E of the Bankruptcy Act of 1898 the mortgage in question, being void as to one creditor or class of creditors is void *in toto* at the suit of the trustee.

Section 70E of the Bankruptcy Act reads:

> "The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a *bona fide* holder for value prior to the date of the adjudication.

> Such property may be recovered or its value collected from whoever may have received it, except a *bona fide* holder for value. For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

There is no express language in this section which specifically gives to any unsecured creditor of a bankrupt any greater rights or any secured creditor any less right than he had before adjudication in bankruptcy. The rights of a trustee in bankruptcy to "avoid any transfer" are no greater than those of a creditor or particular class of creditors. It is clear, we think, that a trustee in bankruptcy is limited in his control and disposition of the estate of the bankrupt to the rights of creditors as such rights existed and could be enforced under the state law prior to the time proceedings in bankruptcy were instituted. This is not a case of an ordinary transfer of property in whole or in part in fraud of creditors, but a case of a transfer made void by statute only as to a specific class of creditors. In National Bank vs. Moore, 247 Fed. 913, this court said:

> "The trustee, in the interest of the general creditors, may therefore contest any claim of lien that a judgment creditor might contest if bankruptcy had not intervened."

In the case at bar only judgment creditors of the first or second class specified could have successfully

contested the mortgage had not bankruptcy intervened.

We quote with approval the following from the memorandum opinion of Judge Killits filed in the court below:

> "In 1910, the bankruptcy act was amended to make clear the position of the Trustee. It seems to have been the theory of the Referee that the effect of this amendment, which gave the Trustee the status of an execution creditor, so far affected the status of the creditors of each of the three classes, as against the mortgage, as to place them all on the same level of superiority. In this we are very clear that the Referee was wrong. There is nothing whatever in the cause for, or the language of the amendment of 1910 to produce such a result. The Trustee indeed represents all creditors, but only as their respective interests in the property under administration were fixed by local law when the bankruptcy proceedings intervened, and it is his duty to administer and distribute accordingly as he finds at that time liens or inferiorities of respective creditors were established. If at that time any creditors had no inchoate right under existing state laws to reduce his claim to judgment and thereby establish a lien by execution superior to an existing and recorded mortgage, he is bound in distribution to recognize the latter's superior position. It is said, as a settled law in federal courts, that there is so much of local nature

entering into chattel mortgages that federal courts accept as decisive the state law fixing the priority of such encumbrance. Etheridge vs. Sperry, 139 U. S. 266. See, also, In re Baxter and Co., 154 Fed. 22; and Union Bank of Chicago vs. Kansas City Bank, 136 U. S. 223."

In Peters vs. Bain, 133 U. S. 670, considering a statute relating to fraudulent conveyances somewhat similar to the statute here in question, the Supreme Court reiterated the views of that court that it would accept the conclusions of the highest court of the state as controlling.

It is contended in the brief of appellant that one of the cars covered by the mortgage was part of the bankrupt's stock in trade and hence was not subject to chattel mortgage under section 2955, California Civil Code. As this question does not appear to have been presented to or considered by the referee or court below, we express no opinion. If there is merit in the contention it may be presented in the further bankruptcy proceedings.

The order is affirmed.

[Endorsed]: Opinion. Filed Dec. 6, 1930. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 6147.

WM. H. MOORE, Jr., Trustee in Bankruptcy for the Estate of SASSARD & KIMBALL, INC., Bankrupt,

Appellant,

vs.

O. S. BAY,

Appellee.

DECREE U. S. CIRCUIT COURT OF APPEALS.

Appeal from the District Court of the United States for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court in this cause be, and hereby is, affirmed, with costs in favor of the appellee and against the appellant.

It is further ordered and adjudged by this Court that the appellee recover against the appellant for his costs herein expended, and have execution therefor.

[Endorsed]: Decree. Filed and entered Dec. 6, 1930. Paul P. O'Brien, Clerk.

At a stated term, to wit, the October Term, A. D. 1930, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the twelfth day of January, in the year of our Lord one thousand nine hundred and thirty-one. Present: Honorable FRANK H. RUDKIN, Circuit Judge, Presiding; Honorable CURTIS D. WILBUR, Circuit Judge.

[Title of Cause.]

ORDER DENYING PETITION FOR A REHEARING.

Upon consideration thereof, and by direction of the court, IT IS ORDERED that the petition of appellant, filed January 5, 1931, for a rehearing of above cause be, and hereby is denied.

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, Paul O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing fifty-five (55) pages, numbered from and including 1 to and including 55, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellant, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 24th day of February, A. D. 1931.

[Seal] PAUL P. O'BRIEN,
Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 20, 1931

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.